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## THE ARMY

## LAWYER

DA PAMPHLET 27-50-21 HEADQUARTERS, DEPARTMENT OF THE ARMY, WASHINGTON, D.C.

## Discrimination in Public Accommodations

The study that follows is the fourth of several case studies for the Handbook on Race Relations. The Judge Advocate General has tasked TJAGSA to draft this handbook and preview various portions in *The Army Lawyer*. Additional installments in this series will be forthcoming.

## Fact Situation.

The Top Hat is a small but active club outside the gate of Fort Webster. The club offers a membership card to just about all who apply or seek entry at the door and continually encourages patronage by soldiers in the community. Lieutenant Ronald Hanson, a black officer from the post, had heard much about the food served in the club's dining room and the name bands playing there each weekend, and decided to try the place out. Upon arrival he parked his car and proceeded to the entrance where he was stopped by a doorman who asked to see his membership card. Hanson stated he did not realize he needed a card, particularly since friends on post had indicated anyone could get in and they all utilized the club on a regular basis. The doorman made it quite clear that Lieutenant Hanson would not enter and stated: "How else do you think we can keep this place clean and lily white?" Hanson got the point and left. He has now raised a formal complaint of racial discrimination with the command at Fort Webster, claiming the club should be open to all or placed off-limits. Is his complaint valid? What are the protections afforded to minority servicemen refused service or entry to places of public accommodations? What is the role of the command and particularly the staff judge advocate in determining the presence of proscribed discrimination and insuring appropriate action to remove such whenever found?

## SJA Actions.

The Civil Rights Act of 1964<sup>1</sup> outlaws discrimination based upon race, color, religion, or national origin in places of public accommodation which involve interstate commerce, or

which is supported by state action. The areas defined as public accommodations in this statute include generally hotels, restaurants, gas stations, and places of entertainment. There are definite exceptions to the provisions of the statute which allow discrimination in boarding houses containing five or less rooms, one of which is occupied by the proprietor as his residence, and for strictly private clubs.<sup>2</sup> Remedial action affords protection to the complainant in the nature of injunctive relief and recovery of attorneys' fees and costs.<sup>3</sup> "Actions for damages are not directly authorized by the Act, but it is possible to sue under either 42 U.S.C. 1983 or 42 U.S.C. 1985(3) for damages for the denial of rights owing their existence to the Civil Rights Act of 1964."<sup>4</sup> The Act also provides for suits by the Attorney General in cases where the public interest is involved.<sup>5</sup>

Department of the Army has promulgated Army Regulation 600-22<sup>6</sup> to insure utilization of the Civil Rights Act of 1964 by its personnel. This regulation sets forth guidelines for assisting servicemen in filing complaints of discrimination with the Attorney General. Such complaints may arise through the post Equal Opportunity, Inspector General, or Legal Assistance offices and there is no question that the staff judge advocate has a direct obligation to act whenever a complaint is made.<sup>7</sup> The command as a whole has a duty to investigate complaints of discrimination under Army Regulation 600-22. However, it is to be noted that the power of the commander to both investigate and take appropriate action is limited to those facilities considered to be within reasonable commuting distance of the installation,<sup>8</sup> and further, to act only in those cases dealing with permanent party personnel.<sup>9</sup> Even in such cases where command action is precluded, however, the staff judge advocate has an affirmative duty to counsel the complainant as to actions he may take on his own to seek redress. The manner in which this counseling is done may be highly important in retaining the credibility of the command on similar issues which may arise. While the above

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provisions may narrow command responsibility under the Act to some degree, it is to be noted that Army Regulation 600-22 itself broadens the coverage of the Act in other aspects. Specifically, while the Civil Rights Act of 1964 has no effect in overseas areas, overseas commanders have a clear duty to enforce the policies of the Act in their commands:

The fact that the Civil Rights Act of 1964 does not provide a judicial remedy in a given case of discrimination affecting military personnel or their dependents does not relieve a commander of the responsibility to seek equal treatment and opportunity for his men, and for their dependents, off the installation as well as on. See AR 600-21<sup>10</sup>

It must be understood that Army Regulation 600-22 is not intended to limit the statutory rights of any complainant, but rather, to expand and assist with the application and enforcement of such rights. There is no requirement that a complainant go through command channels prior to seeking assistance from the Attorney General or taking action for private redress on his own. However, utilization of the procedures of the regulation should give better direction to the complainant's actions and should alert the command to potential problem areas which could have a serious effect on morale and mission accomplishment.

Applying the statutory and regulatory provisions to the factual situation presented, it appears an investigation should lead to a finding of proscribed racial discrimination at the Top Hat. Initially, determination must be made whether the club falls within the Civil Rights Act of 1964 at all. On its face, the club is acting as a private organization within the "private club" exception of the statute. An argument might be raised that even if the club is truly private, its discrimination falls within the "state action" provisions of the Act due to the fact that the licenses allowing it to function are issued by the state. In this regard, however, note *Moose Lodge v. Irvis*,<sup>11</sup> wherein the United States Supreme Court held mere licensing to be insufficient state action to uphold a claim of state-supported discrimination. Viewing the general activities of the club, it appears that it is not truly a private organization, but rather a public night club acting under the facade of a private club for the sole purpose of keeping out unwanted guests—particularly blacks. Of course, there is a problem question of proof in all such cases, but a

close look at the general *modus operandi*, and use of verifiers from the post, should be sufficient to give a definite answer in a relatively short period of time.

Assuming the first hurdle of the private club exception is met, does the Top Hat fall within the proscriptions of the 1964 Act? The club does have a restaurant which is principally engaged in selling food for consumption on the premises.<sup>12</sup> In order to meet the standard of involvement in interstate commerce required by the Act, courts have applied a substantial action test and have looked at the percentage of products utilized by the restaurant which have moved through interstate commerce.<sup>13</sup> Based on the present diversity of commercial activity in the United States today, the number of restaurants not receiving a significant supply of their products from interstate commerce would have to be quite small.

The club may also fall afoul of the statute as a place of entertainment. While the use of purely local bands would possibly grant protection to the club,<sup>14</sup> the regular presence of name bands should be sufficient to bridge the gap to involvement in interstate commerce and again bring the activities of the club within the coverage of the Act.

Once investigation has borne out the allegations of the complaint, the command has an obligation to take action to attempt to open the facility to all its personnel. Through dealings with the proprietor the command can make Army policy known and seek assurances that further discrimination will not occur. Aside from the leverage present through contact with the office of the Attorney General in cases covered by the 1964 Act, the command has leverage in its own right through Army Regulation 190-24.<sup>15</sup> Particularly in areas where public establishments seek out and need the patronage of servicemen, referral of cases of discrimination to the local Armed Forces Disciplinary Control Board for "off-limits" action should lead to assurances of equal treatment in most cases.

There is no question that command interest and credibility play an important part in all race relations issues. Due to the key role set forth for the staff judge advocate by Army Regulation 600-212, judge advocate personnel in the field must be fully aware of and interested in assisting to expedite and insure proper and complete

processing of all verified cases of prohibited discrimination in local public accommodations.

#### Checklist.

1. Complaint received.
2. Contact with EOT and other offices designated locally for handling complaints of discrimination.
3. Insure command action proper—within commuting distance, etc.
4. Advise complainant of rights under 1964 Civil Rights Act and Army Regulation 600-22.
5. Preliminary inquiries/attempts to get voluntary assurances throughout (forwarding of initial report to Attorney General Civil Rights Division).
6. Investigation. Advice to Investigating Officer. Review of Report of Investigation for legal sufficiency.
7. Off-Limits action.
8. Forwarding of Report of Investigation to OT-JAG: Litigation, for possible action by Attorney General.

#### Footnotes

1. Act of July 2, 1964, PL 88-352, Title II, 78 Stat. 243 42 USC 2000a-2000a-6; see also DoD Instruction 5525.2, 24 July 1964.
2. 42 USC 2000a(b)(1); 2000a(e).
3. 42 USC 2000a-3(b).
4. Antieu, FEDERAL CIVIL RIGHTS ACTS, 1971, at 175.
5. 42 USC 2000a-5.
6. Army Reg. 600-22, "Processing Requests of Military Personnel for Action by the Attorney General Under the Civil Rights Act of 1964," 4 September 1964.
7. Army Reg. 600-22, para. 4b; Army Reg. 608-50, "Legal Assistance," 22 Feb. 1974, para. 7b.
8. Army Reg. 600-22, para. 5c(2)(b).
9. *Id.* para. 5c(2)(a).
10. *Id.* para. 13.
11. *Moose Lodge v. Irvis*, 407 US 163 (1972).
12. 42 USC 2000a(b)(2).
13. *Daniel v. Paul*, 395 US 298 (1969); see Antieu, *supra* at 165.
14. *Robertson v. Johnson*, 294 F. Supp. 618 (1966).
15. Army Reg. 190-24, "Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement," 12 February 1974; see para. 14, AR 600-21.

## Award of Judge Advocate Specialty Designations

The following instructions for the award of Judge Advocate Specialty Designations are set forth for the benefit of the entire Corps.

1. Qualified JAGC officers will henceforth be awarded legal specialty designations as a personnel management tool. The specialty designations are: procurement specialist; appellate lawyer; trial lawyer; staff judge advocate; post or command judge advocate; patent lawyer; claims specialist; international law specialist; trial or appellate judge; litigation specialist; labor law specialist; administrative law specialist; and legal assistance specialist.

2. Award will be made by PP&TO and entered on Officer Record Brief, based on the standards at pages 2-7. Entries will not be made on Personnel Qualification Records maintained by military personnel officer in the field.

3. An officer may be awarded more than one specialty. Awards will be made during 1974 of specialty designations for all experience acquired over past years. The officer need not be presently working in the specialty to be awarded the designation for it. For future years, officers will be recommended for award as provided by para 4 as they become qualified.

4. Staff and Command Judge Advocates, and Senior JAGC officers in each judge advocate office will forward to PP&TO by 30 September 1974 the names and qualifications of eligible officers under their supervision.

*Procurement Specialist:* Completion of, or credit for, both Basic and Advanced Courses at TJAGSA, unless this requirement is waived by The Judge Advocate General. Familiarity with all types of appropriated and non-appropriated fund procurement and contracts.

Experience in not less than two major procurement assignments, one involving procurement law advice at the level of contracting officer or above, or performance of the supervisory duties of, and occupancy of the position of, a senior trial attorney practicing before the Armed Services Board of Contract Appeals, or appointment as judge of the Armed Services Board of Contract Appeals. Successful completion of a master program in procurement law may be substituted for one of the major procurement assignments.

*Appellate Lawyer:* Completion of, or credit for, both Basic and Advanced Courses at TJAGSA, unless this requirement is waived by The Judge Advocate General. At least five years experience in criminal law, at least two years of which were spent as a briefing attorney in one of the appellate divisions. Considered capable of holding the position of branch chief in one of the appellate divisions by the chief of division.

*Staff Judge Advocate:* Service as Staff Judge Advocate, for at least one year, for a general court-martial jurisdiction, or other jurisdiction recognized as comparable by The Judge Advocate General. Attendance at, or credit for, both the Basic and Advanced Courses at TJAGSA, unless this requirement is waived by TJAG. Active duty JAGC service of at least five years.

*Post or Command Judge Advocate:* Service as the Senior Judge Advocate in a post or command, in such jurisdictions as may be approved by The Judge Advocate General. Attendance at, or credit for, the Basic Course at TJAGSA, unless this requirement is waived by The Judge Advocate General. Active duty JAGC service of at least two years.

*Trial Lawyer:* Assignment for a minimum of 24 months primarily to trial work. Completion of, or credit for, the Basic Course at TJAGSA, unless this requirement is waived by The Judge Advocate General. Trial of minimum of 75 courts-martial, of at least 25 thereof being general or bad-conduct discharge special courts-martial and at least 10 thereof being contested.

*Patent Lawyer:* A bachelors degree in science or engineering, or experience deemed equivalent by The Judge Advocate General. At least two years experience in the Patents Division, OTJAG, or experience deemed equivalent by The Judge Advocate General and admission to the Patent Bar. Completion of the Basic Course at TJAGSA, unless this requirement is waived by TJAG.

*Claims Specialist:* At least five years experience in claims duties, one year of which was with the command claims service of a CONUS Army or major overseas command or equivalent command, or the US Army Claims Service, or Tort branch (Litigation Division, OTJAG), or as a student or instructor in Civil Law (Claims); or

service for three years with the US Army Claims Service, or Tort Branch, Litigation Division. Completion of, or credit for, the Basic Course at TJAGSA.

*International Law Specialist:* Completion of the Basic and Advanced Courses at TJAGSA, or credit therefor, unless this requirement is waived by TJAG. At least two years of service during which at least half the officer's duty time was devoted to international law, or service for at least two further years at the level of division chief or below in a major headquarters overseas, or at the level of division chief or below in the IA Division, OTJAG, or duty for two or more years as a teacher of International Law at TJAGSA.

*Judge, Trial and Appellate:* Completion of at least seven years of active JAGC service. Completion of, or credit for, both Basic and Advanced Courses at TJAGSA, unless this requirement is waived by TJAG. Completion of at least five years service during which the principal duty was processing of criminal cases either as counsel, appellate counsel, part-time judge, court commissioner, chief of criminal Law Division of a general court-martial jurisdiction, instructor of Criminal Law at TJAGSA, action officer in Criminal Law Branch, OTJAG, or three years duty as a full-time general court-martial judge.

*Litigation Specialist:* Completion of, or credit for, the Basic Course at TJAGSA, unless this requirement is waived by TJAG. At least two years experience in the Litigation Division, OTJAG, or experience—civilian or military—deemed equivalent by TJAG.

*Labor Law Specialist:* Completion of one law school course in Labor Law or the equivalent by self-study. Completion of, or credit for, the Basic Course at TJAGSA, unless this requirement is waived by TJAG. Completion of TJAGSA Law of Federal Employment Course and attendance at one of DCSPER Field Courses (Collective Bargaining Workshop/Labor-Management Seminar/Labor-Relations Course). Active practice, full or part-time, in labor law or civilian personnel law as advisor to management and technical personnel for six months. At least one appearance before an administrative law judge in a Department of Labor hearing or participation in a hearing before the United States Civil Service Commission or United States Army Civilian Appellate Review Agency.

*Administrative Law Specialist:* Completion of the basic and Advanced Courses at TJAGSA, or credit therefor, unless specifically waived by TJAG. Completion of at least five years service, during three years of which the principal duty was work in administrative law/military affairs at a military installation having general court-martial jurisdictions or two years as an instructor in the field, at TJAGSA or as an action officer in the Administrative Law Division, OTJAG.

*Legal Assistance Specialist:* Completion of the Basic and Advanced Courses at TJAGSA, or credit therefor, unless specifically waived by TJAG. Completion of at least three years JAGC service, during at least two years of which officer's principle duty was legal assistance.

### New DOD Counsel and USCMA Judge

The military legal community is pleased to welcome Martin R. Hoffmann as the new General Counsel of the Department of Defense. He took over this post in March. No stranger to Defense activities, the 42-year old Massachusetts native is presently a major in the Army Reserve and served as Special Assistant to the Secretary and Deputy Secretary of Defense for the 11 months preceeding his new duties.

During his varied legal career, Mr. Hoffmann has served as General Counsel of the Atomic Energy Commission and as Assistant General Counsel and Assistant Secretary of the University Computing Company in Dallas. Earlier, he

was legal counsel to Senator Charles H. Percy of Illinois, and minority counsel for the House Judiciary Committee. Mr. Hoffmann was an Assistant US Attorney for the District of Columbia, and also served as a law clerk for Judge Albert V. Bryan of the United States Court of Appeals for the Fourth Circuit in Alexandria, Virginia.

The new General Counsel served four years of Army active duty (1954-58), including service as aide-de-camp to the Commanding General of the 101st Airborne Division, Fort Campbell, Kentucky. He holds a bachelor's degree from Princeton University and received his law de-

gree from the University of Virginia. Mr. Hoffmann is married to the former Margaret Ann McCabe. They and their three children presently reside at 1341 Pine Tree Road in McLean, Virginia.

William Holmes Cook was sworn in as associate judge of the United States Court of Military Appeals on August 21, 1974. Nominated by President Nixon for the remainder of the term of judicial office expiring May 1, 1976, Judge Cook was unanimously confirmed by the Senate on August 16, 1974. He succeeds William H. Dardent who resigned effective December 29, 1973.

Immediately prior to his appointment Judge Cook served as counsel for the Committee on Armed Services of the House of Representatives. From 1948 to 1950, he was engaged in the private practice of law with Judge John T. Kin-

caid. In 1954 he took a leave of absence to serve as a staff member of the Senate Committee on Banking and Currency. In 1957 he was named Assistant to the Chairman of the Federal Trade Commission after having served as an attorney with the Commission from 1954. In 1959 he became Assistant Counsel to the Bureau of Naval Weapons. He was then appointed Associate Counsel for Property and Special Matters of the Bureau of Naval Weapons, before becoming counsel for the House Armed Services Committee in 1963.

Judge Cook was born on June 2, 1920, and received his B.A. from Southern Illinois University in his home town of Carbondale. He received his J.D. from Washington University in St. Louis. In 1947 he was admitted to the Illinois Bar, and to practice before the Supreme Court in 1956.

### Elimination of the Morning Report

*The complete text of the following DA message is reproduced for the benefit of all individual Judge Advocates.*

Effective 1 Sept 74, all Army units supported by a SIDPERS activity will cease preparing the DA Form 1 for personnel strength accountability. The DA Form 1 will be replaced by the SIDPERS (Standard Installation/Division Personnel System) Personnel System.

The elimination of DA Form 1 necessarily entails the elimination of DA Form 188, and therefore impacts upon the administration of military justice, especially in cases arising under articles 85 and 86, UCMJ. Two new forms will be available for use as documentary evidence. The use of these new forms will be governed by C.7, AR 680-1, dated 18 June 74, effective 1 Sept 74. DA Form 4187 is a four-copy form, for use by individual service members to request or initiate personnel actions, and for use by the reporting unit to notify Finance of a change in a service member's duty status, so that appropriate action can be taken with regard to pay and allowance entitlements. When Section II is completed, the original of DA Form 4187 will be inserted into the service member's Field 201 file. Section II of DA Form 4187, "Duty Status Change," is that part of the form used to record AWOL's, DFR's, and returns. Entries in section II are made in straight-forward language, and may be hand printed rather than typed. DA Form 2475-2 is a chronological listing of SID-

PERS entries made on an individual member by the reporting unit. DA Form 2475-2, essentially, is a historical summary, prepared and maintained as an official record, for temporary retention by the reporting unit and later permanent filing. When a service member is dropped from the rolls as a deserter, the original DA Form 2475-2 will be inserted in the member's Field 201 file, and a duplicate copy will be made and retained in the unit files. Part II (reverse side) of DA Form 2475-2, "SIDPERS Transaction-Disposition," contains the chronological entries listing duty status changes of service members. These entries will be written in transaction mnemonics, which are shortened word-type codes which contain key letters of the original words (e.g., "DPRT" is the mnemonic used for a departure transaction).

Contrary to the prior message on this subject, Reference DAJA-MJ 1974/11135, 311400Z Jan 74, the DA Form 4187, with an accompanying certification from the custodian of the member's Field 201 file, is not envisioned as the primary evidentiary document in AWOL and desertion cases. Either DA Form 4187 or DA Form 2475-2 may be used as evidentiary documents, as both qualify equally as official records. Because C.7, AR 680-1, imposes preparation and maintenance/custodial duties at unit level as well as custodial duties at military personnel office level for both forms, the certification possibilities for use at courts-martial are as follows:

A.) Paragraphs 5-3, 5-5, and 5-6, C.7, AR 680-1, impose upon unit commanders the mandatory requirement of preparing and maintaining DA Forms 2475-2 for each assigned/attached member. Thus, in the instance of a member AWOL for less than 29 days, the unit commander can authenticate the DA Form 2475-2 as an official record. The proponent of AR 680-1 desires, in so far as possible, to have the original DA Form 2475-2 remain in the orderly room, unless it is forwarded to the servicing MILPO, as required, when the service member is dropped from the rolls. The proponent of the AR 680-1 envisions that the original DA Form 2475-2 will remain available in the orderly room so that future entries can be made on the document if the service member has not been dropped from the rolls. However, the proponent of AR 680-1 realizes that it may be necessary to use the original DA Form 2475-2 as evidence. In such event, a duplicate copy will be retained in the orderly room, pending return to the orderly room of the original DA Form 2475-2. If the original DA Form 2475-2 is introduced in evidence, upon completion of the trial, a photocopy may be substituted for inclusion in the record of trial and the original returned to its custodian. Trial counsel should be careful to seek permission of the court to substitute a copy of the original in the record of trial. A suggested authentication certificate for the original DA Form 2475-2 should contain words such as:

(Date Certificate Prepared)

I certify that I am the Commanding Officer of the organization recorded in Part I of this Form, and the official custodian of the Personnel Data — SIDPERS Cards, DA Form 2475-2, of the organization recorded in Part I, and that the attached/foregoing is the original of the DA Form 2475-2 of said organization maintained at,

Relating to (Grade)

(First Name), (Middle Name),  
(Last Name) (SSN)

(Signature)

Typed Name, Grade, and  
Branch of Service

B.) In the event a photocopy of the original DA Form 2475-2 is offered as evidence, its admissibility will be subject to the best evidence rule. A suggested authentication certificate for

a photocopy of the DA Form 2475-2 should contain words such as :

(Date Certificate Prepared)

I certify that I am the Commanding Officer of the organization recorded in Part I of this Form, and the official custodian of the Personnel Data—SIDPERS cards, DA Form 2475-2, of the organization recorded in Part I, and that the attached/foregoing is a true and complete copy of the DA Form 2475-2 of said organization maintained at

relating to (Grade) (First Name)  
(Middle Name) (Last Name)  
(SSN)

(Signature)

Typed Name, Grade, and  
Branch of Service.

C.) Paragraph 5-6B(9), C.7, AR 680-1, requires the inclusion of the original DA Form 2475-2 in a member's Military Personnel Records Jacket once he has been carried as DFR. Thus, once a member is DFR'd, the 201 File custodian can authenticate the DA Form 2475-2 as an official record. The authentication certificate should be similar to the certificates currently used on DA Forms 20 and Article 15's. However, because Paragraph 5-6B(8), C.7, AR 680-1, requires that the unit maintain a duplicate of the DA Form 2475-2 forwarded to its servicing MILPO, a copy of that DA Form 2475-2 could still be authenticated by the unit commander.

D.) Paragraph 5-3A(1), C.7, AR 680-1, requires that unit commanders prepare and maintain DA Forms 4187 for all assigned/attached personnel. Paragraphs 5-10A(1), (2), and (3) require retention, at unit level, of copy 3 of a submitted 4187 for one year. Thus, in all AWOL and desertion cases, the unit commander can authenticate DA Forms 4187 as official records. If copy 3 is to be introduced into evidence, an authentication certificate could read as follows:

(Date Certificate Prepared)

I certify that I am the Commanding Officer of the organization listed on the attached/foregoing form, and the official custodian of Copy 3 of the Personnel Action Sheet, DA Form 4187, of the organization listed thereon, and that the attached/foregoing is a true and complete duplicate original (carbon copy) of the DA Form 4187 of said organization submitted at,



relating to	(Grade)
(First Name),	(Middle Name),
(Last Name)	(SSN)
	(Signature)
	Typed Name, Grade, and
	Branch of Service

E.) Paragraph 5-10A, C.7, AR 680-1, requires that the originals (Copy 1) of DA Forms 4187 be forwarded by unit commanders to the servicing MILPO for inclusion in member's 201 File when Section II is completed. Therefore, the 201 File custodian can authenticate DA Forms 4187 as official records. The authentication certificate should be similar to the certificates currently used on DA Forms 20 and Article 15's.

Which authentication method is chosen is left to the discretion of the trial counsel. However, trial counsels should be mindful of the time periods prescribed for holding these documents at unit and MILPO levels (Paragraphs 5-6A, and 5-10A, C.7, AR 680-1) in deciding which method is used for lengthy AWOL's. They should also be mindful of who is authorized to sign DA Forms 4187 in the absence of the unit commander (Paragraph 5-9F, AR 680-1). Additionally, trial counsels should consider that admission of one DA Form 2475-2 can save the necessity of offering into evidence multiple DA Forms 4187.

JA's should emphasize to commanders and AG personnel that particular attention should be paid to cases where a service member is reassigned to another unit and does not report to that unit. In such cases, a DA Form 4187 must be prepared by the gaining unit with an appropriate "Assigned-Not-Joined" entry in Section

II. (See Paragraph 5-9C, C.7, AR 680-1) If a non-reporting member is subsequently dropped from the rolls as a deserter, it is imperative that charge sheets and copies of the DA Form 4187, showing the DFR, and a copy of the DA Form 4187, showing "Assigned-Not Joined" be forwarded to the servicing MILPO. Under such circumstances it will be necessary to create a temporary MPRJ.

An amendment has been requested by DAJA-MJ to Paragraph 5-6B(9), C.7, AR 680-1. This amendment has been distributed as a message change pending republication of Ch. 5, AR 680-1 (Reference A). It reads:

(9) Combine three copies of the sworn charge sheets (which have been receipted by the officer exercising summary court-martial jurisdiction, in accordance with Paragraph 33B, *Manual for Courts-Martial, United States 1969 (Revised Edition)*), relevant statements, and the required copies of DA Form 4187 with the original copy of the DA Form 2475-2 for transmission to MILPO for inclusion in the individual's MPRJ as an action pending document.

The material added by the amendment appears in parenthesis. Also, Section III of Chapter 5, C.7, AR 680-1, contains a notice stating "Use of Section III is Deferred." The Section III, the use of which is deferred, is Section III on the face of the DA Form 4187, not Section III of Chapter 5, C.7, AR 680-1.

All requests for further information or other guidance should be forwarded in writing, through technical channels, to DAJA-MJ.

## Criminal Law Items

*From: Criminal Law Division, OTJAG*

**1. Faulty SJA Reviews.** Unwarranted errors in the staff judge advocate's post-trial review continue to plague the effective administration of military justice. An example of the disregard for attention to detail in the preparation of the review may be found in the recent United States Court of Military Appeals decision of *United States v. Boyd*, 23 USCMA 90, 48 CMR 598 (1974). The accused was convicted of assault whereby grievous bodily harm was intentionally inflicted. The review in *Boyd* erroneously advised the convening authority that he had been

convicted of assault with intent to commit murder. Such a review is misleading on an essential point and, therefore, unacceptable. Recurring errors of this nature invariably require unnecessary appellate action, in addition to a new review and action by a convening authority. Further, in view of the recent decision in *Dunlap v. Convening Authority, Combined Arms Center*, 23 USCMA 135, 48 CMR 751 (1974), which guarantees a confined prisoner the right to speedy disposition of his case after conviction, such errors may require ultimately the



dismissal of the charges. The importance of a correct and meaningful post-trial review cannot be overemphasized. Accordingly, staff judge advocates are expected to prepare post-trial reviews with the utmost care, and to scrutinize their end product before submission to the convening authority in order to insure accuracy.

**2. Improper Recruiting Practices.** Improper recruiting practices have been the subject of a number of recent decisions by USCMA and ACMR. On 25 July 1974, the Court of Review handed down its opinion in *United States v. Bunnell*, \_\_\_CMR\_\_\_ (ACM, SPCM 9150). Citing the recent USCMA decisions in *United States v. Brown*, 23 USCMA 162, 48 CMR 778

(1974), and *United States v. Catlow*, 23 USCMA 142, 48 CMR 758 (1974), Chief Judge Sneed, speaking for the court, set aside Bunnell's conviction of larceny, AWOL, making a false statement, and perjury, noting that Bunnell's recruiters actively assisted him in concealing his civil convictions, including a felony conviction. No evidence had been presented to the trial court on whether a constructive enlistment had arisen. In light of these decisions, trial counsel are reminded of the necessity of fully presenting, at trial, all available evidence which would support an accused's constructive enlistment whenever lack of jurisdiction resulting from unlawful recruiting practices is raised by the defense.

## Claims Items

*From: U.S. Army Claims Service*

**Interrelationship of the Foreign Claims Act and the Maritime Claims Settlement Act.** The scope of this article is limited to settlement of tort claims against the United States generated by personnel or property of the U.S. Army outside the United States, its territories and possessions where the claimant and the decedent in a death case are both inhabitants of a foreign country.

There is considerable overlap in the territorial jurisdiction of the Foreign Claims Act (FCA) (10 U.S.C. 2734 as implemented by Chapter 10, AR 27-20) and the Army's Maritime Claims Settlement Act (MCSA) (10 U.S.C. 4802 as implemented by Chapter 8, AR 27-20). The MCSA generally applies on navigable waters worldwide, provided there is a relationship between the wrong which generated the claim and some maritime service, navigation or commerce. The FCA, on the other hand, is applicable worldwide except within the United States, its territories, commonwealth or possessions. As to the FCA, in addition to the territorial limits of its jurisdiction, the claimant (and the decedent in a death case) must have been inhabitants of a foreign country at the time of the incident which generated the claim. Paragraph 10-8, AR 27-20, contains an adequate explanation of the term "inhabitant."

There is a potential conflict between the MCSA and FCA whenever a maritime tort claim involves a claimant who is an inhabitant, corporate or otherwise, of a foreign country and

arises outside the United States, its territories and possessions. Neither statute contains a provision establishing a priority in case of conflict. The Secretary of the Army, however, has resolved the problem by providing in regulations that claims which may be settled under Chapter 8, AR 27-20, may not be settled under Chapter 10 unless specifically authorized by the Chief, U.S. Army Claims Service (see paragraphs 8-6b and 10-4d, AR 27-20). The regulations do not outline the circumstances under which the Chief, U.S. Army Claims Service would authorize settlement of a MCSA claim under the FCA. Precedents and policy of the U.S. Army Claims Service, however, indicate that authorization to process a MCSA claim under the FCA should be granted in an instance involving a meritorious small claim of an unsophisticated claimant arising in an area remote from the U.S. Army Claims Service, but readily accessible to a Foreign Claims Commission. A meritorious claim of a claimant engaged in the maritime industry on a substantial scale would normally be retained under the MCSA unless the time limitations provision of Chapter 8, AR 27-20, which was adopted from the Suits in Admiralty Act (46 U.S.C. 741-752), has barred settlement of the claim under the MCSA. In addition, authorization to settle a MCSA claim under the FCA would normally be granted in case of a claimant in the maritime industry only if the claimant has filed a timely claim and the failure to settle the claim within the two year period is due to fault on the part of U.S. Government personnel.

The statutory time limitation provision of the FCA and the time limitations provision made applicable to the MCSA by Chapter 8, AR 27-20, differ significantly in operation. Under the FCA, a claim, even an oral one, will toll the running of the statutory limitations provision and, thereafter, there is no specified limitation on the period of time available for settlement of the claim. Under Chapter 8, AR 27-20, however, the period available for making an administrative settlement of a claim is the same as the Suits in Admiralty Act (46 U.S.C. 741-752), that is, two years from the date of origin of the cause of action. This period cannot be extended by the assertion of a claim, correspondence, or negotiations relating thereto. Subject to the exception noted below, the authority to make an administrative settlement is terminated by the expiration of the two year period. If, however, an action is filed in a U.S. District Court before the end of the statutory two year time limita-

tions period of the Suits in Admiralty Act (46 U.S.C. 745), an administrative settlement may be negotiated by the Chief, U.S. Army Claims Service, even though the two year period has elapsed, provided claimant obtains the written consent of an appropriate office of the Admiralty and Shipping Section, Department of Justice, charged with defense of the action.

From time to time a claim becomes barred by the time limitations provision of Chapter 8, AR 27-20, because of inaction on the part of U.S. Army personnel. In view of the short and inflexible period of time available for the processing of claims under the MCSA, it is particularly important to expeditiously process such claims. In addition, the provisions of paragraph 8-8c, AR 27-20, should be carefully complied with so that the U.S. Army Claims Service can timely advise claimants or potential claimants of the applicable time limits.

### Captains' Advisory Council Notes

**1. Field Law Library System.** The Captains' Advisory Council has received letters from officers at several installations concerning the status of their respective field law libraries inquiring as to and the proper procedures for acquiring new materials for their libraries. The Council has undertaken an inquiry into the "front office" operations of the Army Field Law Library System and will report extensively on its findings in the future.

In the interim the following information is provided. Officers who desire to request new materials for their law libraries should address their requests to:

The Field Law Library Committee  
Room 2E-443  
The Pentagon  
Washington, D.C. 20310

Requests for materials already listed on the Selections and Holdings List should be addressed to:

The Army Library  
ATTN: AFLLS  
Room 1A-518  
The Pentagon  
Washington, D.C. 20310

Requests should include the title, author, publishing data and (where appropriate) list

price. The request should include a statement of justification stating the reasons for requests of new materials. The Field Law Library Committee is composed of JAG officers from the divisions of OTJAG. It evaluates the requests for materials from the field and provides guidance for the Army Law Librarian in several areas. Decisions as to requests are made after an evaluation of the office functions served by the requesting field law library, availability of stock and/or funds, and the content of the material requested.

While both the Selections and Holdings List and Army Regulation 1-115, *The Army Field Law Library System*, are being revised they should nonetheless be considered when requests are being made.

**2. Contacting The CAC.** Captains Charles E. Bonney, Administrative Law Division, OTJAG; Gerald W. Davis, Criminal Law Division, OTJAG; Wilfred G. Grandison, International Law Division, OTJAG; and William C. Kirk, U.S. Army Legal Service Agency have been appointed to The Judge Advocate General's Captains' Advisory Council. Anyone who wishes to contact the CAC may reach its members at the addresses and numbers below. A letter addressed to Chairman, The Judge Advocate General's

Captains' Advisory Council, Department of the Army, Office of The Judge Advocate General, Washington, D.C. 20310, will always reach the council.

CPT Charles E. Bonney  
(AU) 227-6000

CPT Joseph Casper  
(AU) 227-2376

CPT Gerald W. Davis  
(AU) 227-1418

CPT Fitzhugh Godwin  
(Secretary)  
(AU) 225-1700

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## Personnel Law Litigation

The following selected list of case citations in the area of Personnel Law Litigation is offered for the benefit of all Judge Advocate officers. The listing was prepared by Royce C. Lamberth, Assistant United States Attorney for the District of Columbia, for presentation at The Judge Advocate General's Captains' Conference held at Fort George G. Meade, Maryland, earlier this summer.

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### I. General Scope of Review of Military Determinations

- Parker v. Levy, 42 U.S.L.W. 4979 (Sup.Ct., No.73-206, 19 Jun 1974)
- Gilligan v. Morgan, 413 U.S. 1, (1973)
- Orloff v. Willoughby, 345 U.S. 83 (1953)
- Mindes v. Seaman, 453 F. 2d 197 (5th Cir., 1971)
- Allgood v. Kenan, 470 F. 2d 1071 (9th Cir., 1972)

- Roth v. Laird, 446 F. 2d 855 (2d Cir., 1971)
- Turpin v. Laird, 452 F. 2d 240 (9th Cir., 1971)
- Arnheiter v. Chafee, 435 F. 2d 691 (9th Cir., 1970)
- Cortright v. Resor, 447 F. 2d 245 (2d Cir., 1972), *cert. denied* 405 U.S. 965

### II. Jurisdiction

#### A. Preliminary Relief

- Virginia Petroleum Jobbers v. FPC, 259 F. 2d 291 (D.C. Cir., 1958)
- Blankenship v. Boyle, 447 F. 2d 1280 (D.C. Cir., 1971)
- Pauls v. Secretary of the Air Force, 457 F. 2d 294 (1st Cir., 1972)
- Sofranko v. Froehke, 346 F. Supp. 1380 (W.D. Tex., 1972)

- B. Habeas Corpus, 28 U.S.C. 2241, *et seq.*
- Braden v. 30th Judicial Circuit Court, 410

U.S. 484 (1973)  
 Strait v. Laird, 406 U.S. 341 (1972)  
 Schlanger v. Seamans, 401 U.S. 487 (1971)  
 U.S. ex rel. Rudick v. Laird 412 F. 2d 16 (2d Cir., 1969) *cert. denied* 319 U.S. 918

#### *AWOL Soldiers*

Johnson v. Laird, 432 F. 2d 77 (9th Cir., 1970)  
 Hitchcock v. Laird, 456 F. 2d 1064 (4th Cir., 1972)  
 Moroni v. Froehke, 343 F. Supp. 671 (E.D. Pa., 1972)

#### *C. Sovereign Immunity*

Dugan v. Rank, 372 U.S. 609 (1962)  
 Hawaii v. Gordon, 373 U.S. 57 (1963)  
 Goldberg v. Daniels, 231 U.S. 218 (1913)  
 Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682 (1949)  
 Updegraff v. Talbott, 221 F. 2d 342 (4th Cir., 1953)  
 American Dietetics Co. v. Celebrezze, 317 F. 2d 658 (2d Cir., 1963)  
 McQueary v. Laird, 449 F. 2d 608 (10th Cir., 1971)

#### *D. Official Immunity*

Barr v. Matteo, 360 U.S. 564 (1959)  
 Howard v. Lyons, 360 U.S. 593 (1959)  
 Norton v. McShane, 332 F. 2d 855 (5th Cir., 1964), *cert. denied* 380 U.S. 981 (1965)  
 Sulger v. Pochyla, 397 F. 2d 173 (9th Cir., 1968), *cert denied* 393 U.S. 981 (1968)  
 Berndtson v. Lewis, 465 F. 2d 706 (4th Cir., 1972)  
 Green v. James, 473 F. 2d 660 (9th Cir., 1972)

#### *E. Federal Question, 28 U.S.C. 1331*

McGaw v. Farrow, 472 F. 2d 952 (4th Cir., 1973)  
 Gomez v. Wilson, 477 F. 2d 411 (D.C. Cir., 1973)  
 Spock v. David, 469 F. 2d 1047 (3d Cir., 1972)  
 Cotter Corporation v. Seaberg, 370 F. 2d 686 (10th Cir., 1966)  
 Anderson v. United States, 229 F. 2d 675 (5th Cir., 1956)  
 Switkes v. Laird, 316 F. Supp. 358 (S.D.N.Y., 1970)  
 Goldsmith v. Southerland, 426 F. 2d 1395

(6th Cir., 1970), *cert. denied* 400 U.S. 960 (1970)

Quinault Tribe of Indians v. Gallagher, 368 F. 2d 648 (9th Cir., 1966), *cert denied* 387 U.S. 907 (1968)

#### *F. Mandamus, 28 U.S.C. 1361*

Carter v. Seamans, 411 F. 2d 767 (5th Cir., 1969)  
 Janett v. Resor, 426 F. 2d 213 (9th Cir., 1970)  
 Gonzales-Salcedo v. Lauer, 430 F. 2d 1282 (9th Cir., 1970)  
 Schmidt v. Laird, 328 F. Supp. 1009 (E.D.N.C., 1971)  
 McQueary v. Laird, 449 F. 2d 608 (10th Cir., 1971)  
 Prairie Band of Pottawatomie Indians v. Udall, 355 F. 2d 364 (10th Cir., 1966), *cert. denied* 385 U.S. 831  
*Contra:* Burnett v. Tolson, 474 F. 2d 877 (4th Cir., 1973)

#### *G. Declaratory Judgment, 26 U.S.C. 2201, et seq.*

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)  
 Schilling v. Rogers, 363 U.S. 666 (1960)  
 Janett v. Resor, 426 F. 2d 213 (9th Cir., 1970)  
 Gonzales-Salcedo v. Lauer, 430 F. 2d 1282 (9th Cir., 1970)

#### *H. Administrative Procedure Act, 5 U.S.C. 701, et. seq.*

Yahr v. Resor, 339 F. Supp. 964 (E.D.N.C., 1972)

#### *I. Burden of Pleading and Proving Jurisdiction*

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936)  
 Russell v. New Amsterdam Casualty Company, 325 U.S. 996, 998 (8th Cir., 1964)  
 F&S Construction Company v. Jensen, 337 F. 2d 160 (10th Cir., 1964)  
 Jeffers v. United States, 133 F. Supp. 426 (E.D. Wisc., 1955)  
 Pugliano v. Staziak, 231 F. Supp. 347 (W.D. Pa., 1964)

### **III. Review of Medical Determinations**

(See ARs 40-501, 40-3, 635-40, 635-200, 140-120)

Byrne v. Resor, 412 F. 2d 774 (3d Cir., 1969)  
 Karpinski v. Resor, 419 F. 2d 531 (3d Cir., 1969)  
 United States v. Haifley, 432 F. 2d 1064 (10th Cir., 1970)  
 Weber v. Clifford, 289 F. Supp. 960 (D. Md., 1968)  
 Rank v. Gleszer, 288 F. Supp. 174 (D. Colo., 1968)  
 Taylor v. Chafitz, 461 F. 2d 621 (3d Cir., 1972)  
 Grosso v. Resor, 439 F. 2d 233 (2d Cir., 1971)  
 Haggerty v. Selective Service System, 449 F. 2d 795 (3d Cir., 1971)  
 Patterson v. Commanding General, 321 F. Supp. 1080 (W.D. La., 1971)

#### IV. Review of Bad Time Determinations

(See AR 630-10)  
 Beaty v. Kenan, 420 F. 2d 55 (9th Cir., 1969)  
 McFarlane v. DeYoung, 431 F. 2d 1197 (9th Cir., 1970)  
 Roberts v. Commanding General, 314 F. Supp. 998 (D. Md., 1970)  
 Gaston v. Cassidy, 296 F. Supp. 986 (E.D.N.Y., 1970)  
 Parsley v. Moses, 138 F. Supp. 799 (D.N.J., 1956)  
 Forbes v. Laird, 340 F. Supp. 193 (E.D. Wisc., 1971)  
 Emma v. Armstrong, 473 F. 2d 656 (1st Cir., 1973)

#### V. Review of Hardship Discharge/Compassionate Reassignment Determinations

Feliciano v. Laird, 426 F. 2d 424 (2d Cir., 1970)  
 U.S. ex rel. Schonbrun v. Commanding Officer, 403 F. 2d 371 (2d Cir., 1968)  
 Cuadra v. Resor, 437 F. 2d 1211 (9th Cir., 1970)  
*Contra:* Townley v. Resor, 323 F. Supp. 567 (N.D. Cal., 1970)

#### VI. Failure to Follow Regulations

A. *Basic Rule (Prejudice Required)*  
 Bluth v. Laird, 435 F. 2d 1065 (4th Cir., 1970)  
 Smith v. Resor, 406 F. 2d 141, 146 (2d Cir., 1969)  
 Nixon v. Secretary of the Navy, 422 F. 2d

934 (2d Cir., 1970)  
 Antonuk v. United States, 445 F. 2d 592, 597 (6th Cir., 1971)  
 Schatten v. United States, 419 F. 2d 187 (6th Cir., 1969)

B. *Justiciability (Reg. for Benefit of Army)*  
 Allgood v. Kenan, 470 F. 2d 1071 (9th Cir., 1972)  
 Silverthorne v. Laird, 460 F. 2d 1175 (5th Cir., 1972)  
 Cortright v. Resor, 447 F. 2d 245 (2d Cir., 1971), *cert denied* 405 U.S. 965  
 U.S. ex rel. Lewis v. Laird, 337 F. Supp. 118 (S.D. Ill., 1972)

#### VII. Proper Training/Ability to Perform Duties

McAbee v. Martinez, 291 F. Supp. 77 (D. Md., 1968)  
 Drifka v. Brainard, 294 F. Supp. 425 (W.D. Wash., 1968)

#### VIII. Community Hardship Determinations

Wishner v. Laird, Civil No. 72-2615-R (C.D. Calif., 1973) 1 Mil. Law Rptr. 2049  
 Sofranko v. Froehlke, 346 F. Supp. 1380 (W.D. Tex., 1972)  
 Hutcheson v. Hoffman, 439 F. 2d 821 (5th Cir., 1971)  
 Roth v. Laird, 446 F. 2d 855 (2d Cir., 1971)

#### IX. Conscientious Objector Timeliness Rules

Spencer v. Laird, 442 F. 2d 904 (2d Cir., 1971)  
 Earls v. Resor, 451 F. 2d 1126 (2d Cir., 1971)  
 Johnson v. Laird, 435 F. 2d 493 (9th Cir., 1970)

#### X. Review Limited to Admin Record

Bates v. Commander, 413 F. 2d 475 (1st Cir., 1969)  
 Silberberg v. Willis, 420 F. 2d 662 (1st Cir., 1970)

#### XI. Enlistment Problems

A. *General*  
 Chalfant v. Laird, 420 F. 2d 945 (9th Cir., 1969)  
 Gausmann v. Laird, 422 F. 2d 394 (9th Cir., 1969)  
 Shelton v. Brunson, 465 F. 2d 144 (5th Cir., 1972)

Johnson v. Chafee, 469 F. 2d 1216 (9th Cir., 1972)

Kubitschek v. Chafee, 469 F. 2d 1221 (9th Cir., 1972)

Bemis v. Whalen, 341 F. Supp. 1289 (S.D. Calif., 1972)

Colden v. Asmus, 322 F. Supp. 1163 (S.D. Calif., 1971)

**B. Enlistment While Induction Order Outstanding**

Tuxworth v. Froehlke, 449 F. 2d 763 (1st Cir., 1971)

Stokum v. Warner, 360 F. Supp. 261 (C.D. Calif., 1973)

**C. Enlistment in Delay Program - Failure to Call Promptly**

U.S. ex rel. Lewis v. Laird, 337 F. Supp. 118 (S.D. Ill., 1972)

**XII. Construction of Regulations**

Keister v. Resor, 462 F. 2d 471 (3d Cir., 1972)

Emma v. Armstrong, 473 F. 2d 656 (1st Cir., 1973)

Pifer v. Laird, 328 F. Supp. 649 (N.D. Calif., 1970)

**XIII. General Due Process Considerations**

Turpin v. Laird, 452 F. 2d 240 (9th Cir., 1971)

Crotty v. Kelly, 443 F. 2d 214 (1st Cir., 1971)

Hagopian v. Knowlton, 470 F. 2d 201 (2d Cir., 1972)

**XIV. Publication in Federal Register**

Pifer v. Laird, 328 F. Supp. 649 (N.D. Calif., 1970)

**XV. Army Wig Cases**

Friedman v. Froehlke, 470 F. 2d 1351 (1st Cir., 1972)

Harris v. Kaine, 352 F. Supp. 769 (S.D.N.Y., 1972)

McWhirter v. Froehlke, 351 F. Supp. 1098 (D.S.C., 1972)

**XVI. Mootness**

North Carolina v. Rice, 404 U.S. 244 (1971)

Muskrat v. United States, 219 U.S. 346 (1911)

Oil Workers' Union v. Missouri, 361 U.S. 363 (1960)

**XVII. Exhaustion of Remedies**

**A. Failure to take Admin Appeal Precludes Relief**

Breinz v. Commanding General, 439 F. 2d 785 (9th Cir., 1971)

Rainha v. Cassidy, 454 F. 2d 207 (1st Cir., 1972)

**B. Article 138 (10 U.S.C. 938; AR 27-14)**

U.S. ex rel. Berry v. Commanding General, 411 F. 2d 822 (5th Cir., 1969)

See also: Smith v. Resor, 406 F. 2d 141 (2d Cir., 1969)

Schatten v. United States, 419 F. 2d 187 (6th Cir., 1969)

Rasmussen v. Seamans, 432 F. 2d 346 (10th Cir., 1971)

**C. ABCMR, ADRB (10 U.S.C. 1552, 1553; ARs 15-185, 15-180)**

Peppers v. U.S. Army, 479 F. 2d 79 (4th Cir., 1973)

Davis v. Secretary of the Army, 440 F. 2d 817 (5th Cir., 1971)

Pickell v. Reed, 446 F. 2d 898 (9th Cir., 1971)

In re Kelly, 401 F. 2d 211 (5th Cir., 1968)

McCurdy v. Zuckert, 359 F. 2d 491 (5th Cir., 1966), cert. denied 385 U.S. 903

Reed v. Franke, 297 F. 2d 17 (4th Cir., 1961)

**D. Bad Time Determinations (AR 630-10)**

Emma v. Armstrong, 473 F. 2d 656 (1st Cir., 1973)

**E. General**

Parisi v. Davidson, 405 U.S. 34 (1972)

Beard v. Stahr, 370 U.S. 41 (1962)

Gusik v. Schilder, 340 U.S. 128 (1950)

Noyd v. Bond, 395 U.S. 683 (1969)

McKart v. United States, 395 U.S. 185 (1969)

McGee v. United States, 402 U.S. 479 (1971)

**XVIII. Discharge v. Release from Custody and Control**

Eagles v. U.S. ex rel. Samuels, 329 U.S. 304 (1946)

Peckat v. Lutz, 451 F. 2d 366 (4th Cir., 1971)

Lovallo v. Froehlke, 468 F. 2d 340 (2d Cir., 1972)

U.S. ex rel Okerlund v. Laird, 473 F. 2d 1286 (7th Cir., 1973)

## Report on the Equal Employment Opportunity Commission

By: Eric H. Vinson, Legal Intern, Civilian Personnel Law Office, OTJAG

### The Role of the Equal Employment Opportunity Commission.

The Equal Employment Opportunity Commission was established by Title VII of the Civil Rights Act of 1964 and given the responsibility of ensuring that, employers, employment agencies and unions comply with that Act.

Title VII was the first equal employment legislation passed by Congress and prohibits discrimination in employment based on race, color, religion, sex or national origin.

More importantly, however, Section 704(a) of Title VII prohibits an employer, labor organization or employment agency from discriminating against an individual because that individual has filed a charge or participated in a proceeding under Title VII. Retaliation, whether in the form of a discharge, harassment or refusal to hire is a violation. Where preliminary investigation reveals that prompt judicial intervention is necessary, the Commission is authorized to seek injunctive relief. Use of this authority is particularly appropriate in retaliation cases, both protect the charging party's employment and prevents the chilling effect of retaliation on witnesses whose cooperation is essential to the conduct of a full investigation.

A comparison of the activities and the emphasis of the Commission in its first year with that of the present Commission will give more accurate picture of the role of the Commission has had in the elimination of employment discrimination.

The first Commission began work with a small budget and staff. Even though only 2,000 job discrimination complaints were expected that first year, the Commission actually received, almost 9,000 complaints. Most of these emphasized de facto discrimination. At this point, the Commission was a complaint-centered agency. On a case-by-case basis, the Commission attacked overt discrimination, which was necessary, but not a sufficient means of handling the problem. It became increasingly obvious to the Commission that discrimination in employment is perpetuated by elements of oppression within an economic, social, and political system which must be understood and analyzed as a system. During the next ten years, therefore, the Commission attacked systemic discrimination and

accomplished many noteworthy results in furthering its Congressional mandate to eliminate job discrimination.

These results are achieved in several ways. The Commission investigates individual charges of discrimination and seeks voluntary agreements; it provides technical assistance to employers and unions seeking to comply with the law, it conducts hearings on selected employment practices in selected industries and areas, it assists state and local anti-discrimination agencies; it conducts educational programs through film seminars, broadcasts and publications; and it conducts and sponsors research into the causes of discrimination. Furthermore, through assisting in significant legal cases as *amicus curiae* and initiating suits to enforce the provisions of the Act, the Commission attacks employment discrimination through federal court litigation.

### Equal Employment Opportunity Commission Administrative Function.

Another important function of the Commission is its administrative role. The administrative procedures and programs of the Commission have indeed had a strong effect on employment discrimination. The purpose of most of these administrative programs has been to secure voluntary compliance with the Act to foster an atmosphere conducive to successful conciliation attempts.

For example, the Commission has funded research and development programs attempting to eliminate racial discrimination in referral unions. In 1972, the Commission developed an affirmative action plan at the request of the Washington Printing Specialist and Paper Products Union. Local 449, to add 800 black employees within the union's jurisdiction and eventually to achieve 24 percent minority representation in the Washington area's 40 unionized printing plants. The Commission has also held several administrative hearings on employment discrimination. These hearings have had a significant impact on voluntary compliance under the Act.

It is the Commission's view that hearings are appropriate where systems of discrimination are apparent on a regional basis. Hearings



center on such factors as compliance history, minority employment and potential for increased utilization of minorities on the workforce. They serve as part of the Commission's continuous research into the causes and extent of employment discrimination. These hearings also serve to stimulate public discussion and encourage constructive community dialogue on equal employment opportunity.

In the past the Commission has held public hearings on white collar employment in New York, on utilization of minority workers in Los Angeles, and general minority employment practices in Houston, and on public utility employment practices in Washington. At the hearings, the Commissioners received testimony from representatives of the industries involved and community organizations and individuals appearing at their own request. The purpose was to "tell it as they see it" from their local vantage points. It was not to receive specific charges of discrimination against local employers or unions. The objective was only to publicize the status of equal employment opportunity.

Until 1972, the Commission did not have direct enforcement authority. Only private parties could bring suit. However, the Commission sought to assist the federal courts in resolving novel issues of employment discrimination through filing *amicus* briefs, frequently at the request of the courts to allow no procedural impediment to stand in the way of resolution of cases on their merit.

Courts have consistently adopted these views, and all of the procedural steps, except the filing of a charge and notification of a right to sue, have been written out of the Law as prerequisites to suit.

Additional procedural issues, on which the courts have agreed with the Commission's analysis, which include the expansion of charges to cover broad systematic forms of discrimination under the Fifth Circuit opinion in *Sanchez v. Standard Brands*, and in the filing of broad class actions, under the Eighth Circuit case of *Parkham v. Southwestern Bell Telephone* and two Ninth Circuit cases have led to a growing number of class action settlements in conciliation agreements as well as in litigation.

The Commission has also sought to eliminate systematic discrimination through administrative law enforcement techniques. One of these

projects—that of the New Jersey Division on Civil Rights—has resulted in consent orders with three union and employer associations involving over 3,000 black employees. The consent orders are designed to eliminate discriminating apprenticeship and membership requirements and to increase minority referrals and membership. Material developed by the New Jersey program will be provided to six other Commission funded agencies which have initiated charges, alleging a pattern or practice of discrimination against referral trade unions.

### **The Relationship of EEOC To Title VII.**

The Commission since its inception, has also sought to establish legal precedents defining the scope and meaning. The courts have consistently supported the Commission's own interpretation of Title VII, and the legal concepts enunciated by the courts have had far reaching effects on the Commission activities. As is true for procedural issues, courts have generally accepted the Commission's interpretation of substantive issues under Title VII.

The Supreme Court adopted the Commission's views in two landmark cases which have been the basis for a substantial body of employment discrimination litigation. They are *Griggs v. Duke Power Co.* and *Martin Marietta Corp.* *Griggs* held that any employment practice which has a discriminatory effect is unlawful under Title VII unless compelled by a business necessity. *Griggs* also held that employment tests, which have always excluded a disproportionate number of minority employees from better jobs, have to be job related, even though adopted pursuant to a legitimate business purpose without specific intent to discriminate.

In *Martin Marietta*, a sex discrimination case, the Supreme Court held that a policy prohibiting hiring of employees with preschool age children, applicable only to women, was a violation of Title VII.

### **EEOC Policy and Sex Discrimination.**

Employers may not discriminate on the basis of sex with regard to any "fringe benefits," such as medical, hospital, accident, and life insurance and retirement and pension plans. The fact that the cost of such benefits may be greater for one sex than the other is immaterial. Conditioning fringe benefits on whether the employee is the head of household "or principal wage earner" in

the family unit will be found a prime facie violation of the Act inasmuch as conditioning tends to discriminatarily affect the rights of women employees. Disabilities caused by pregnancy should be treated as the employer treats other temporary disabilities under its health or temporary disability insurance or sick leave plan. Thus, employees are entitled to the same provision with regard to leave, pay, insurance, coverage, accumulation of seniority, reinstatement, etc., when they are physically unable to work due to pregnancy, as when they are physically unable to work for other reasons.

Moving from fringe benefit questions to other aspects of employment, the Sex Guidelines also hold that employers may not refuse to hire applicants for employment or fire employees simply because they are pregnant; accordingly, an employer's requirement that all pregnant employees cease work at the conclusion of a specified number of months of pregnancy violates Title VII.

#### **EEOC Remedies.**

The Commission's role in seeking results under the Act has been furthered by its authority to compel compliance with Title VII through litigation. The majority of the cases filed by the Commission, however, are still at the pre-trial stage. A few have been dismissed on procedural grounds. Several have resulted in the pretrial settlements granting substantial relief to the instance of discrimination. For example, in *EEOC v. Uniroyal*, a case filed in Baton Rouge, Louisiana, a settlement award of \$275,000 in back pay was granted to black employees, who were private party intervenors in the suit. In a sex discrimination case in Memphis, Tennessee, *EEOC v. St. Louis Waterworks*, a \$10,000 settlement award was obtained. These settlements have served as warning to employers that the Commission does intend to enforce the Act aggressively. Most recently, 3 June 1974, the Supreme Court ruled that most employers who underpay their female workers will have to equalize their wages promptly and make up for past underpayments.

The court also stated if employers have been failing to pay women as much as men for equal work done, it is not enough under federal law to open higher-paying jobs to women for the future.

It should be emphasized that the Commission does not offer an exclusive remedy for employ-

ment discrimination. Relief may begin in an employment contract itself—at least where the contract contains an anti-discrimination clause, sometimes by the procedures of the National Labor Relations Act, the Federal Parking Act and comparable State Labor Laws, and the regulatory machinery of Federal, State and Local Commissions regulating particular industries such as that of the Federal Communications Commission with respect to employment discrimination in the communications industry. Also there is the contract compliance processes of the Office of Federal Contract Compliance and its network of contracting on compliance agencies which seek to require anti-discrimination commitments from employers performing federal contracts, affirmative action plans for equal opportunity from these employers, and requires regular reviews of their compliance and of their fulfilling the objectives of their affirmative action plans. The foregoing may be called "a representative sample" of the kinds of mechanism that an employer or union may face in dealing with employment discrimination issues. However, of more importance to an employer or labor union is that monetary relief in the form of back pay is available under Title VII. Back pay is not a punitive measure but an equitable remedy intended to restore to the recipients wages which they have lost due to unlawful discrimination. A court may award the difference between what an employee should have earned, absent discrimination, and his or her actual wages. The courts have recognized good faith reliance on state protective laws as an affirmative defiance to back pay claims in discrimination cases.

#### **Summary.**

The cases cited above, coupled with the Commission's expanded enforcement powers under Section 707, in pattern or practice cases will have a decisive impact on the success of the Commission administrative procedures. In the past, the net impact on the "cause finding" and conciliation procedure established by the Commission under Title VII was apparently small. Undoubtedly the cost of settlement, as perceived by the employer, is an important variable influencing the outcome of conciliation negotiations; and previously, the Commission without enforcement power, had frequently been unable to increase the potential cost of noncompliance sufficiently.

### TJAGSA—Schedule of Resident Continuing Legal Education Courses Through 30 August 1974

Number	Title	Dates	Length
512-71D20/40	4th Military Lawyer's Assistant (Civil)**	23 Sept-27 Sept 74	1 wk
512-71D20/40	3d Military Lawyer's Assistant (Criminal)***	23 Sept-27 Sept 74	1 wk
5F-F16	2d Legal Assistance	30 Sep-3 Oct 74	3½ days
CONF	The Judge Advocate General's Conference	6 Oct-10 Oct 74	5 days
5F-F7	2d Reserve Senior Officer Legal Orientation	15 Oct-18 Oct 74	3½ days
5F-F8	17th Senior Officer Legal Orientation	4 Nov-7 Nov 74	3½ days
5F-F11	60th Procurement Attorneys	11 Nov-22 Nov 74	2 wks
CONF	U.S. Army Reserve Judge Advocate Conference	4 Dec-6 Dec 74	3 days
5F-F10	11th Law of Federal Employment	9 Dec-12 Dec 74	3½ days
5F-F12	5th Procurement Attorney, Advanced	6 Jan-17 Jan 75	2 wks
5F-F17	1st Military Administrative Law and the Federal Courts	13 Jan-16 Jan 75	3½ days
5F-F8	18th Senior Officer Legal Orientation	27 Jan-30 Jan 75	3½ days
7A-713A	5th Law Office Management	3 Feb-7 Feb 75	1 wk
5F-F15	2d Management for Military Lawyers	10 Feb-14 Feb 75	1 wk
5F-F8	* 19th Senior Officer Legal Orientation	24 Feb-27 Feb 75	4 days
CONF	National Guard Judge Advocate Conference	2 Mar-5 Mar 75	4 days
5F-F11	61st Procurement Attorneys	24 Mar-4 Apr 75	2 wks
5F-F13	2d Environmental Law	7 Apr-10 Apr 75	3½ days
5F-F8	20th Senior Officer Legal Orientation	14 Apr-17 Apr 75	3½ days
(None)	3d NCO Advanced	28 Apr-9 May 75	2 wks
5F-F6	5th Staff Judge Advocate Orientation	5 May-9 May 75	1 wk
5-27-C8	22d JA New Developments Course (Reserve Component)	12 May-23 May 75	2 wks
5F-F1	17th Military Justice	16 Jun-27 Jun 75	2 wks
5F-F1	Administration Phase	16 Jun-20 Jun 75	1 wk
5F-F1	Trial Advocacy Phase	23 Jun-27 Jun 75	1 wk
5F-F8	21st Senior Officer Legal Orientation	30 Jun-3 Jul 75	3½ days
5F-F9	14th Military Judge	14 Jul-1 Aug 75	3 wks
5F-F3	19th International Law	21 Jul-1 Aug 75	2 wks
5F-F11	62d Procurement Attorneys	28 Jul-8 Aug 75	2 wks

\* Army War College only

\*\* Formerly listed as "4th Civil Law Paraprofessional"

\*\*\* Formerly listed as "3d Criminal Law Paraprofessional"

### Court Reporters, Welcome to the Twentieth Century

*From: Developments, Doctrine and Literature Department, TJAGSA*

The "state of the art" in your field has reached the point where computerized transcription of trial notes can be performed. Five firms in the United States are or are close to marketing systems which will permit overnight transcription of

records and over 50 reporters are working with one or another of these systems. Catch 22: all systems are dependent upon stenotyped notes entered on a note-taking machine modified to produce computer-readable output.

This reliance on the stenotype method will persist for some time; the technology for translating stenographic or voice notes to computer usable form is immature and prohibitively expensive. The modification of the stenotype machine is quite similar to the one commercially available which permits the production of computer-readable tape or cards by certain modern typewriters. Costs in this variation are within acceptable limits. A court-reporter competent in the stenotype method need learn only

a few mechanical procedures and some new telephone numbers to get "wired-into" one of these new systems.

The Army has no present plan to acquire any of these systems. Obviously, their deployability is open to some question and we are limited by the number of stenotype operators available. However, the direction of developments in the field is clear. A prudent person will begin to think about those developments and about the need for self-improvement.

## Personnel Section

**1. JAG Job Vacancies.** In addition to the vacancies for JAG captains listed in the July 1974 issue of *The Army Lawyer* (many of which are as yet unfilled) the following additional vacancies exist for JAG captains and will be open after 1 January 1975. Requirements or active duty specifications at each location are indicated.

a. 82d Airborne Division, Fort Bragg, North Carolina (must be airborne qualified or willing to attend airborne school at Fort Benning, Georgia enroute to Fort Bragg).

b. Litigation Division, OTJAG (two-year tour minimum).

**2. Senior Trial Lawyers.** New additions to the list of Senior Trial Lawyers (appearing in the July issue of *The Army Lawyer*) include:

Captain John F. DePue  
 Captain Roy L. Dodson  
 Captain Thomas C. Lane  
 Captain Joseph R. Rivest  
 Captain Robert A. Skeels

**3. Free Membership in the Judge Advocates Association.** At the last Board of Directors Meeting of the Judge Advocates Association held in Hawaii on August 12, 1974, the Board of Governors approved a by-law change to the charter of the Association to permit from date of application a one-year free trial membership for each newly commissioned legal officer in the Armed Forces of the United States. Officers must have held their JAGC commissions for less

than six months in order to apply as newly commissioned personnel under the by-law change.

The Judge Advocates Association is a national legal society and an affiliated organization of the American Bar Association. It is neither an official spokesman for the services nor the sounding board for particular groups or proposals. The Association is a group which seeks to explain to the organized bar the disciplinary needs of the Armed Forces, and at the same time seeks to explain to the nonlawyers in the Armed Forces that the American tradition requires for the citizen in uniform not less than the citizen out of uniform those minimal guarantees of fairness which go to make up the attainable ideal of "Equal justice under law." In pursuit of this purpose, the Association devotes itself to the sound development of military law in the establishment and maintenance of an efficient military legal and judicial system. It engages in the dissemination of legal knowledge in its application of the Armed Forces and national security, and publishes *The Judge Advocate Journal* and maintains a directory of members.

All eligible personnel interested in taking advantage of this by-law change and partaking of the one-year trial membership should contact:

Deputy Director for Nonresident Instruction  
 The Judge Advocate General's School, US Army  
 Charlottesville, Virginia 22901

## Current Materials of Interest

### Articles.

Comment, "Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal

Protection Analysis of Military Discharge Certificates," 9 HARV. CIV. RIGHTS CIV. LIB. L. REV 227 (March 1974). This 97-page piece

explores the scope of statutory authority claimed to support "the derogatory system;" of administrative separations; examines the equal protection implications of utilizing the undesirable discharge to impose punishment virtually equivalent to a court-martial conviction; and considers the separate equal protection problem that arises from the differing procedures used to impose the general discharge.

Dilloff, "A Contractual Analysis of the Military Enlistment," 8 U. RICHMOND L. REV. 121-49 (Winter 1974). A Navy JAG officer analyzes the enlistment contract, exploring what documents or acts are necessary to complete the agreement between the volunteer and the government; whether the enlistment agreement satisfies the traditional contractual elements; what effects conditions stated in the contract are given; and the remedies for breach.

Spak, "To Obey or Not to Obey, That is the Question!" 50 CHI.-KENT L. REV. 435-45 (Winter 1973). Explores the nature of the Article 90 offense and its related defenses: mistake of fact, mental defect, intoxication, physical impossibility, etc.

Note, "Freedom of Speech in the Military," 8 SUFFOLK L. REV. 761-83 (Spring 1974). A pre-Levy/Avrech discussion of standards adopted by the courts in determining what speech may be legitimately curtailed in the armed forces.

Comment, "Demilitarizing the Chaplaincy: A Constitutional Imperative," 19 SOUTH DAKOTA L. REV. 351 (Spring 1974). Evaluates the constitutionality of the military chaplaincy in view of recent holdings by the Supreme Court.

Comment on *Newington v. United States*, 354 F. Supp. 1012 (E.D. Va. 1973), 7 VANDERBILT J. TRANS. L. 521-29 (Spring 1974). Reviews the remedy provided a member of the US Armed Forces or civilian component thereof under the NATO Status of Forces Agreement for injuries incurred while serving on US vessels in the territorial waters of a foreign state.

Comment on *Spock v. David*, 469 F. 2d 1047 (3d Cir. 1972), 19 N.Y.L. FORUM 663 (Winter 1974). Reviews the Third Circuit holding that a commanding officer of a military installation open to the general public may not unreasonably restrict political campaigning thereon.

Comment, "Judicial Activity and Public Attitude: A Quantitative Study of Selective Service Sentencing in the Vietnam War Period," 23

BUFF. L. REV. 465 (Winter 1974). Reviews the disparity in sentencing given to defendants convicted under the Selective Service Act, concluding that there is a quantitative correlation between the prevailing attitudes of the public toward the Vietnam War and the sentences delivered on Selective Service defendants.

Comment on *United States v. Holby*, 477 F. 2d 649 (2d Cir. 1973), 1973 WASH. U.L. Q. 939 (Fall). Discusses exhaustion of remedies in selective service cases.

### Courses.

"The Effective Use of Scientific Evidence" will be the subject of the Practising Law Institutes's Seventh Annual Criminal Advocacy Institute, discussing such topics as forensic pathology in homicide cases, neutron activation analysis, voiceprint analysis and alcohol-content test devices. For further information contact: Helen M. Davis, Practising Law Institute, 810 Seventh Avenue, New York, New York, or telephone (212) 765-5700. Programs will be held as follows:

November 15-16	Americana Hotel New York, New York
December 13-14	St. Regis Hotel Detroit, Michigan
January 17-18	Sheraton Harbor Island Hotel San Diego, California

The following seminars are being offered by the National College of District Attorneys for the fall. To register or obtain further information write to that organization % College of Law, University of Houston, Houston, Texas 77004, or telephone (713) 749-1571.

September 8-11	Pretrial Strategy Atlanta, Georgia
September 22-25	Consumer Fraud and Protection Scottsdale, Arizona
October 20-23	Welfare Fraud Washington, DC
November 10-14	Organized Crime Chicago, Illinois
November 20-23	Civil Law Houston, Texas
December 10-14	Advanced Organized Crime Houston, Texas
January 15-18	Pretrial Strategy Denver, Colorado

By Order of the Secretary of the Army:

Official:

**VERNE L. BOWERS**  
*Major General, United States Army*  
*The Adjutant General*

**FRED C. WEYAND**  
*General, United States Army*  
*Chief of Staff*

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